ORIGINAL

RECEIVED
JUL 23 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-60

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES BALKCOM, WARDEN,
Georgia State Prison,

Petitioner,

v.

JACK CARLTON HOUSE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SETH P. WAXMAN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

(Counsel of Record)

JOHN R. MYER
1515 Healy Building
Atlanta, Georgia 30303

JOHN CHARLES BOGER
16th Floor
99 Hudson Street
New York, New York 10013

ANTHONY G. AMSTERDAM
New York University Law School
40 Washington Square South
New York, New York 10012

QUESTION PRESENTED

Whether the court of appeals' grant of a writ of habeas corpus on grounds of ineffective assistance of counsel satisfies this Court's recent decisions in United States v. Cronic and Strickland v. Washington when:

(1) the court of appeals concluded that the failings of respondent's trial counsel were "'so pervasive that a particularized inquiry into prejudice would be "unguided speculation"'"; and

(2) the United States Magistrate, after hearing the evidence of prejudice in light of the entire record, concluded that he "really thought the accused was innocent."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

1. Background.....1

2. District Court Proceedings.....2

3. The Court of Appeals' Conclusions.....3

ARGUMENT.....5

I. Given the Court's Finding That Respondent Received "No Real Representation" At All, Its Conclusion on Prejudice Was Completely Consistent with this Court's Decisions in Cronic and Strickland.....7

II. In Any Event, the Prejudice Demonstrated in this Case Easily Satisfies this Court's Test.....9

1. The Blood Spot Evidence.....10

2. The Confession.....11

3. Alibi.....13

CONCLUSION.....17

TABLE OF AUTHORITIES

Case	Page
Foster v. Lankford, No. 83-871, 104 S. Ct. 2655 (May 29, 1984), denying cert. to No. 82-6644 (4th Cir. 1983)	6
Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)	12
Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cert. denied, 103 S. Ct. 1798 (1983)	6
House v. Balkcom, 725 F.2d 608 (11th Cir. 1984)	passim
House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983)	passim
House v. Georgia, 428 U.S. 910 (1976); 429 U.S. 873 (1976)	2
House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974)	2
Powell v. Alabama, 287 U.S. 45 (1932)	9
Rose v. Mitchell, 443 U.S. 545 (1979)	16
Stone v. Powell, 428 U.S. 465 (1976)	16
Strickland v. Washington, 104 S. Ct. 2052 (1984)	i, 5, 6, 7, 8, 9, 15
United States v. Cronic, 104 S. Ct. 2039 (1984)	i, 5, 6, 7, 8
United States v. Frady, 456 U.S. 152 (1981)	16

STATEMENT OF THE CASE

1. Background

On Sunday, April 16, 1973, respondent Jack Carlton House was arrested for the murders of two seven-year-old boys who had been strangled the day before in a nearby woods. At the time, Mr. House was 27 years old and had never been convicted of a crime. He lived with his wife and three daughters, and although he had completed only the seventh grade and had an IQ of only 77, he was regularly employed (Pet. App. 2b).

Two days after his arrest, Mr. House was allowed his first telephone call. He called his mother, who in turn asked Dorothy Atkins, a local attorney who had previously represented other family members in minor civil matters, to represent her son (Pet. App. 5b). Mrs. Atkins agreed, but perhaps because she had had little or no experience in serious criminal cases, she immediately found herself "stymied" as to how to prepare for trial (Pet. App. 6b; R 16/113). 1/ She visited her client briefly once or perhaps twice in jail and spoke with a few members of his family by telephone. But as she explained: "I did not know what to do at the time. I did not know which way to turn" (R 16/120). Consequently she neither investigated nor prepared anything at all.

A day or two prior to trial, "the seriousness [of the situation] dawned on" Mrs. Atkins, and she asked her husband, Ben S. Atkins, to try the case (Pet. App. 7b; R 16/111, 101). After two and one-half days of testimony, the jury found Mr. House guilty on two counts of first-degree murder and fixed punishment at death. The Georgia Supreme Court affirmed the conviction and

---

1/ The record on appeal is collected in 25 volumes plus two envelopes of exhibits. References shall be by volume and page number. Thus (R 6/21) refers to record volume 6, page 21. "PX" refers to exhibits introduced in the district court by the respondent herein, Mr. House.

sentence, House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), and this Court denied timely petitions for certiorari and rehearing, House v. Georgia, 428 U.S. 910 (1976); 429 U.S. 873 (1976).

On petition for a writ of habeas corpus, Mr. House (now represented by volunteer counsel) contended, inter alia: (1) that he had been denied the effective assistance of counsel before, during, and after his trial; and (2) that the admission of a written "confession" -- the only direct evidence implicating Mr. House -- violated the Constitution because the police had fabricated it and forced him to sign it through physical coercion and without a knowing and voluntary Miranda waiver. The Georgia court denied the petition without a hearing (R 3/530).

2. District Court Proceedings

In the United States District Court for the Northern District of Georgia, the case was assigned to Magistrate J. Owen Forrester, who heard extensive evidence on the ineffectiveness issue. Magistrate Forrester summarized the evidence as demonstrating a "total abdication of responsibility by the [attorneys] to this client, alpha to omega" (R 20/51; 4/889). Commenting on the evidence with respect to prejudice, he stated:

> [T]his is probably the only case that I have had in twelve or fourteen years of being in the criminal justice system when I really thought the convicted accused was innocent of his crime. Not that he should be let go because of some Fourth Amendment ruling, but because I thought him innocent (R 19/21-22; see R 19/9; 20/50).

Magistrate Forrester issued two reports recommending issuance of the writ (R 4/654; 4/882).

While considering this case, Magistrate Forrester was elevated by President Reagan to the position of United States District Judge. Rather than review his own report and recommendation, he transferred the case to Judge Orinda D. Evans. After

calling certain witnesses herself, Judge Evans agreed that Mr. House had received "the functional equivalent . . . [of] no representation at all" at the sentencing stage of his trial, and vacated his death sentence (Pet. App. 80a). With respect to the guilt phase of the trial, Judge Evans agreed that in certain respects Mr. House had been denied effective assistance of counsel: i.e., by the Atkinses' failure "to interview or otherwise obtain information from any of the State's witnesses" and their failure to discover and prepare an available defense to damaging prosecution evidence about a blood spot found on Mr. House's pants (Pet. App. 60a, 62a, 70a). Nevertheless, Judge Evans upheld his conviction because she believed that in these respects Mr. House had not established sufficient prejudice. (With respect to the failure to interview witnesses, however, she acknowledged, however, that due to the substantial passage of time, "meeting this requirement is virtually impossible, regardless of what the facts are" (Pet. App. 71a n.42).)

3. The Court of Appeals' Conclusions

On appeal, the Eleventh Circuit panel unanimously reversed Judge Evans' denial of the writ. [2/] Reviewing the exhaustive and largely undisputed record, the court concluded that "the Atkinses' level of representation was far below acceptable levels at all phases of the case" (Pet. App. 23b). Prior to trial, the court summarized,

> [t]he Atkinses prepared no defense strategy. They filed no pretrial motions, sought no defense witnesses, failed to properly interview even their family-of-accused witnesses, and failed to interview the state's witnesses. The Atkinses did not visit the scene of the crime (Pet. App. 20b-21b).

[2/] The state did not appeal the district court's order vacating Mr. House's death sentence or its finding that Mr. House had been denied effective assistance of counsel at the sentencing phase.

The Atkinses had also "sought no discovery from the prosecution or police" and had not, in any meaningful sense, interviewed or prepared their client (Pet. App. 5b-6b, 19b-22b). Their "unconscionable" failure to prepare, the court concluded, "qualified them only as spectators" at the trial (Pet. App. 20b, 24b).

The court of appeals found that this level of representation continued both during and after the trial. Their "conduct during the guilt-innocence phase of the trial show[ed] an abysmal ignorance of basic trial tactics" and, "[e]ven more disturbing, [a] 'lack of concern for the conduct of the trial itself'" (Pet. App. 21b (quoting R 17/299)). At the sentencing phase of the trial, the Atkinses not only failed to present or even prepare any evidence, but "did not realize that there was a sentencing phase of the trial until [they] were in the middle of it" (Pet. App. 22b).

Following trial, the court noted, Mrs. Atkins was contacted by neighbors of the victims who provided her with testimony that completely undercut the state's theory of guilt and established an alibi for Mr. House. (Magistrate Forrester, who actually heard these witnesses, found them "considerable witnesses in terms of credibility" (R 18/453).) Yet the Atkinses never brought this evidence to the attention of the trial court (or anyone else). 3/ "In the totality of the other failures of the Atkinses," the court of appeals concluded, this suppression

---

3/ Instead, a pro forma motion out of a form book was filed. Yet even in presenting this, counsel were ineffective: when they failed to appear for the argument on the motion, the trial court issued an order to show cause why respondent's counsel should not be held in contempt of court. The court directed that a copy of its order be served on the public defender with another order requiring him to be present in court "to show cause why the Office of the Public Defender should not be appointed to pursue" the motion (R 3/585).

of critical evidence simply "add[ed] to the already ripe impression that no real representation occurred" (Pet. App. 23b).

Based on its conclusion that the Atkinses' conduct throughout "constitute[d] no representation at all," the court of appeals found it unnecessary to engage in a "'particularized inquiry into prejudice'" (Pet. App. 24b):

> Prejudice is not required where the ineffectiveness of counsel is "so pervasive that a particularized inquiry into prejudice would be 'unguided speculation.'" Washington v. Strickland, 693 F.2d at 1259, n.26. We so hold here. The haphazard nature of the Atkinses' defense, the failure to develop strategy of any consequence, and absenting themselves from crucial portions of the trial constitutes no representation at all. Given the totality of the circumstances, ineffectiveness of trial counsel has been amply shown (emphasis added).

The court ordered that a writ of habeas corpus be issued "unless the state, within a reasonable time, sets the case for a new trial" (Pet. App. 25b). 4/

ARGUMENT

The petitioner contends that certiorari should be granted because the court of appeals failed to apply the "prejudice analysis" set forth in this Court's recent decisions in United States v. Cronic, 104 S. Ct. 2039 (1984), and Strickland v. Washington, 104 S. Ct. 2052 (1984). That contention, however, is wrong. Moreover, the prejudice caused by

---

4/ With respect to the confession issue, the court of appeals pretermitted decision (Pet. App. 25b):

> Because we find that House's lawyers were so woefully inadequate in the collection, preservation, and presentation of evidence, and because a new trial is required in this case, we leave the confession issue for decision on the record made at the new trial.

the Atkinses' "unconscionable" failings is so manifest that reconsideration is completely unnecessary.

Indeed, since the court of appeals so obviously believed that sufficient prejudice existed in this case to satisfy any standard, [5/] the only effect of granting certiorari to order the reconsideration sought by petitioner will be to delay for perhaps another year what Mr. House, after eleven years on death row, is so plainly due: a new, fair trial. This Court should resolve this case as it recently did Foster v. Lankford, No. 83-871, 104 S. Ct. 2655, (May 29, 1984), denying cert. to No. 82-6644 (4th Cir. 1983). There, as here, the state relied on Strickland to seek certiorari from a decision of the court of appeals that the defendant had been denied the effective assistance of counsel. After deciding Cronic and Strickland, however, this Court denied certiorari. Yet the ineffectiveness alleged in Foster did not even approach the undisputed facts here, and the court of appeals' opinion in that case never even mentioned the word "prejudice". To say the least, this Court should follow the result in Foster and deny the state's petition for certiorari.

[5/] This case was briefed, argued, and decided while Cronic and Strickland were pending in this Court. The court of appeals was well aware that the prejudice test it had announced in Strickland was under review. Both petitioner and respondent advised the court that the appropriate prejudice standard would likely be decided by this Court, and Mr. House's brief included a section demonstrating that even the strict DeCoster standard (now rejected by this Court) was easily met in this case. Even when the state filed its motion for rehearing, the court of appeals summarily denied it on April 23, 1984, notwithstanding the obvious imminence of this Court's decisions in Cronic and Strickland. Plainly, the court considered that the "prejudice is so obvious that a sufficient degree . . . exists under any standard." Goodwin v. Balkcom, 684 F.2d 794, 818 n.19 (11th Cir. 1982), cert. denied, 103 S. Ct. 1798 (1983).

I. Given the Court's Finding That Respondent Received "No Real Representation" At All, Its Conclusion on Prejudice Was Completely Consistent with this Court's Decisions in Cronic and Strickland

In Cronic and Strickland this Court explained "that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." Cronic, 104 S. Ct. at 2046. "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Strickland, 104 S. Ct. at 2067. In the ordinary case, where a defendant contends "that particular errors of counsel were unreasonable," Cronic and Strickland require also that he show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 104 S. Ct. at 2067, 2068.

Both Cronic and Strickland recognized, however, that in certain instances, prejudice is "presumed." As Cronic explained: "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 104 S. Ct. at 2046-47. Thus, for example, where the record demonstrates a "constructive denial of the effective assistance of counsel altogether," prejudice is "legally presumed." Strickland, 104 S. Ct. at 2067. Or, as the Court stated more fully in Cronic:

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable (Id. at 2047).

This language describes perfectly what the court of appeals confronted in this case. Judge Forrester, who heard the evidence, characterized the level of representation as a "total

abdication of responsibility by the Atkinses to this client, alpha to omega" (R 20/51). The court of appeals, whose opinion demonstrates a detailed understanding of the record, concluded that the Atkinses' conduct "constitutes no representation at all" (Pet. App. 24b). Under these circumstances, the court was entirely justified in holding that "the ineffectiveness of counsel is 'so pervasive that a particularized inquiry into prejudice would be "unguided speculation"'" (Id.). In these circumstances, under the law as stated in Cronic and Strickland, this Court would do no differently. The record in this case simply compels the conclusion that the Atkinses never even came close to "subject[ing] the prosecution's case to meaningful adversarial testing." 104 S. Ct. at 2047. 6/

6/ In its petition, the state does not question the court of appeals' findings with respect to the trial or post-trial phases, but alleges blankly with respect to pretrial conduct that in a few instances the court contradicted or ignored findings of the district court. The examples cited are both misleading and truly inconsequential. Even adopting the district judge's "findings", the uncontradicted record shows that the Atkinses did virtually nothing to prepare for their "defense" of Jack House. Each visited Mr. House once briefly, or at most twice, during the three months between his arrest and trial (Pet. App. 14a-14b). Mrs. Atkins called some members of Mr. House's family on the telephone and "asked them for all the help I could get" (Pet. App. 15a; R 16/114). And that -- by their own admission, the uncontradicted evidence, and the findings of the magistrate, the district judge, and the court of appeals -- was the sum total of their investigation and preparation (see Pet. App. 53a-69a; R 16/116-119; 23/75-76). Neither attempted to find any witnesses beyond the House family or to consult any experts, although it occurred to them that experts could be useful (Pet. App. 69a; R 16/32-36, 56, 76, 119, 121). They made no attempt to preserve evidence of what they were convinced had been a beating administered to coerce Mr. House's confession -- although they saw the evidence with their own eyes (Pet. App. 62a; R 16/12-14, 100-01, 125-26). Neither attempted to speak to the police, the state's experts, or any of the state's other witnesses (all of whom were listed on the indictment) or to conduct any legal research into the statute under which their client was indicted or the legal standards for suppressing confessions (see Pet. App. 59a-60a; R 6/240; 11/193; 16/75, 88). Neither attempted to discover the state's physical evidence or to do anything with the information presented to them by the prosecutor (Pet. App. 62a). Unlike both the police and the prosecutor, they never bothered to visit the crime scene or the neighborhood where Mr. House and the victims lived (Pet. App. 69a). Neither even bothered to try to obtain the confession they knew their client (Cont'd)

II. In Any Event, the Prejudice Demonstrated in this Case Easily Satisfies this Court's Test

Moreover, respondent did introduce evidence -- overwhelming evidence -- of prejudice from his counsel's default. Thus, even if the court of appeals were required to conduct a "particularized inquiry into prejudice," the evidence of prejudice in this case is so plain that it satisfies any test.

The prejudice standard announced in Strickland states simply:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt (104 S. Ct. at 2069).

In this case, evidence of that "reasonable probability" is uniquely available, for a "rational juror" has already reviewed the prejudice evidence in light of the trial record and concluded that it provokes a very substantial doubt of Mr. House's guilt.

Judge Forrester, sitting as magistrate, considered this case for three and one-half years. He carefully reviewed the trial record and (unlike the district judge) heard all of the testimony relating to prejudice. At the conclusion he decided not only that Mr. House's attorneys had denied him effective assistance of counsel and that he had been prejudiced as a result, but also that Mr. House was very probably innocent. As he stated:

> [T]his is probably the only case that I have had in twelve or fourteen years of being in the criminal justice system when I really thought the convicted accused was innocent of his crime. Not that he should be let go

---

had signed (Pet. App. 17a n.14; R 16/122-23; 23/58). The court of appeals' conclusion that the Atkinses' "unconscionable" state of preparation "qualified them only as spectators" is more than lavishly supported by the record. Here, as in Powell v. Alabama, 287 U.S. 45, 57 (1932), "when consultation, thorough-going investigation and preparation were vitally important, [respondent] did not have the aid of counsel in any real sense."

> because of some Fourth Amendment ruling, but because I thought him innocent (R 19/21-22; accord, R 19/20; 20/50).

If the test of prejudice is "a reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt," then this is the best possible proof.

Moreover, the objective evidence of prejudice is simply overwhelming. Although the sheer magnitude of the Atkinses' failings places even a simple enumeration of the instances of prejudice beyond the scope of this pleading, three examples are outlined below:

1. The Blood Spot Evidence

At the time of his arrest, Mr. House's trousers were taken by the police and sent to the state crime lab for analysis. A small spot of blood was found to match one of the victims, but not Mr. House. These findings were contained in a laboratory report and were known to at least two of the witnesses listed on the indictment. But since the Atkinses never sought any discovery, they never knew about it until the trial. Consequently they never discussed the blood spot with their client (who was not aware of it) (R 16/33, 25/29) and thus did not know that Mr. House would testify that the blood might have come from his wife (Pet. App. 26a n.19). As a result, the Atkinses never sought to test Mrs. House's blood and thus never discovered what was easily proved in the federal habeas hearing: Mrs. House's blood does in fact match the spot (Pet. App. 72a; PX C). Even the district court recognized that in this respect the Atkinses had failed to render effective assistance (Pet. App. 70a, 72a).

Obviously, the prejudice from this failing was substantial. Aside from the hotly contested confession, the blood spot was the only substantial evidence of guilt, and it was

the only physical evidence linking Mr. House to the victims. One needs no expertise to realize that, unless otherwise explained, the fact that the spot did not match Mr. House's known blood but did match the blood of one of the murdered boys would be very damaging evidence. The prosecutor (quite properly) alerted the jury in his opening statement to the fact that the evidence would show that the blood spot was not Mr. House's but did match one of the victims (R 6/29). A state expert so testified (R 8/367) and also testified about how rare the blood type was (R 8/365-70). Mr. Atkins, in his opening statement at the close of the state's case, not only highlighted Mr. House's unsubstantiated explanation, but, incredibly, told the jury that he had not even tested Mrs. House's blood to see if his client's story could be substantiated (R 8/407-08). In closing, the prosecutor devoted a substantial portion of his argument to the blood issue and mocked Mr. House's "story" that the blood was his wife's (R 8/583-85).

The prejudice to Mr. House was thus two-fold: first, in the face of scientific evidence, the jury heard only the defendant's uncorroborated assertion that the blood was his wife's, not the victim's. Moreover, Mr. Atkins' announcement to the jury that he had not even bothered to perform the test on Mrs. House did more than permit the jury to infer that the blood did not match: it also invited the belief that not even Ben Atkins believed his client.

2. The Confession

The Atkinses knew from the start that their client had signed a confession, but they believed that he was innocent, that the confession had been fabricated by the police, and that he had signed it only because he had been beaten (R 16/12-13, 74, 86-87, 99, 123, 125-27; 23/51-54; 24/10-13). Yet they made no effort even to review the confession before trial, to question the

police officers who extracted the confession (named on the indictment), or to preserve evidence of the bruises that they themselves saw on Mr. House's body when they first visited him. Mr. Atkins did nothing because "Mrs. Atkins didn't ask me to and Mrs. Atkins was handling it" (R 16/42). Mrs. Atkins did nothing because she "thought the police officers would be human about it when we made the objection and they would be truthful about it" (R 16/126).

The prejudice to Mr. House is apparent. Because the Atkinses had never even read the confession, they were not prepared to demonstrate -- indeed they apparently never noticed -- the inherently suspect nature of the confession, which contains no facts that the police did not know before Mr. House was even arrested (see R 25/70). 7/ Because they preserved no evidence of his physical condition after arrest -- which they had seen with their own eyes -- through photographs or the testimony of disinterested witnesses, 8/ they had nothing to support their client's uncorroborated, uncounselled monologue but their own pathetic attempt to testify themselves (Pet. App. 21b & n.5) 9/

7/ In fact, as the court of appeals noted, Mr. Atkins largely forfeited even the opportunity to challenge the circumstances under which the interrogation had taken place and the confession had been obtained, since Mr. Atkins was not even present in the courtroom during most of the direct testimony of the state's chief witness, Sergeant Fitzgerald, who had conducted the interrogation and obtained the confession.

(Sergeant Fitzgerald, incidentally, was subsequently found by the court of appeals to have "willfully and intentionally conceal[ed] material information" in another capital case. Freeman v. Georgia, 599 F.2d 65, 59 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). In so finding, the court quoted the state habeas court's conclusion (id. n.5) that "[t]his action and conduct by Sgt. Fitzgerald in a capital case was the most reprehensible and gross act of misconduct by an investigating officer that it has ever been the misfortune of the undersigned to be involved in.")

8/ Mr. House himself supplied the names of some witnesses (Pet. App. 21b; R 8/489-90).

9/ The district court sought to justify the Atkinses' failure to (Cont'd)

Yet even this extraordinary step was unprepared: Mrs. Atkins "never anticipated any part of it and did not know [she] was going to get on the stand to testify . . . until a minute or two before [she] volunteered" (R 16/126). At the conclusion of the suppression "evidence", the trial court had to explain to Mr. Atkins that the state, not the defendant, had the burden of proof (R 6/240). Mr. Atkins "didn't think then and . . . still [doesn't] think [the confession] should have been admitted" (R 16/74). Had either he or his wife prepared a defense, it might well not have been.

3. Alibi

The most poignant evidence of prejudice is the so-called Ramsey-Patterson testimony. Ruby Ramsey and Bobbie Patterson were neighbors of the victims and Mr. House. After they became aware that the state's evidence had shown that the victims had been killed between 3:00 and 3:30 p.m., they contacted Mrs. Atkins and informed her that they had seen the two boys alive in Mrs. Ramsey's yard and then in front of Mrs. Patterson's house across the street at 5:00 p.m. that day. Magistrate Forrester heard the testimony of these women (Judge Evans did not) and stated that they were highly credible (R 4/664; 18/453). He also concluded that the failure to bring this testimony to light was the "most egregious" example of the Atkinses' pervasive ineffectiveness (R 4/887). Whether or not

---

photograph the bruises by examining certain police photographs taken on the day of his arrest which, the court found, failed to reveal any "remarkable" bruises. The uncontradicted testimony, however, was that the police photographs were taken long before the confession was ultimately signed and before, according to the testimony, most or all of the beating took place (R 25/109-11, 114-16); indeed, were it otherwise, the state would have rushed to admit them at trial. Moreover, many if not most of the bruises would have taken a day or two to manifest themselves anyway. The point is that the Atkinses themselves saw evidence of the beating and did nothing to preserve it.

the Atkinses should have located these neighbors before trial, it was unconscionable for the Atkinses to have suppressed it once it was given to them. As the magistrate stated (R 4/453):

> I don't have to be a trained defense lawyer to see that any lawyer worth his salt could have made considerable mileage out of the testimony of the two ladies . . . . There is no question but what having learned the information heaven and earth should have been moved.

The significance of the Ramsey-Patterson testimony cannot be overstated, for the state's proof of Mr. House's guilt absolutely depended on the boys being dead before 4:00 p.m. That was the time when Mr. Whitfield, the prosecution's witness, stated he saw someone resembling Mr. House leave the woods (R 6/125). The uncontradicted defense evidence accounted for Mr. House's whereabouts beginning just after 4:00 (R 8/416, 421-23, 425). The prosecutor even argued to the jury that the boys must have been strangled before 4:00 because any later time would be inconsistent with Mr. House's guilt (R 8/581-82). Mrs. Ramsey and Mrs. Patterson (and Mrs. Ramsey's daughter, Kathy, whom Judge Evans did hear and deem credible (R 25/101-03)) were available to provide the strongest possible exculpatory testimony. If they were telling the truth -- and the magistrate expressly stated that he believed them -- Mr. House is innocent. If that does not satisfy the prejudice test, if that does not "undermine confidence in the outcome" of the trial; if that does not establish "a reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt", then those words simply have no meaning.

The record contains many other instances of demonstrable prejudice. 10/ But the three discussed here -- indeed any one of them -- suffice to satisfy this Court's test. In Strickland, 104 S. Ct. at 2064, this Court said: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The overwhelming evidence of ineffectiveness and prejudice in this case simply robs the verdict of this confidence. What would the result have been if evidence of Mrs. House's blood type, objective evidence of Mr. House's beating, and the testimony of Ruby and Kathy Ramsey and Bobbie Patterson had been introduced? What would it have been if Ben Atkins had had evidence to support the defenses he raised, if he had had even a prayer of effectively cross-examining the

---

10/ For example, as the court of appeals noted, "the Atkinses failed to take advantage of significant and possibly exculpatory evidence available from the state's own scientific tests" (Pet. App. 21b). In addition, Mr. Atkins' cross-examination of the state's expert witnesses was "so poor that he failed to bring out points that could certainly have helped his client" (R 17/303; see R 17/289-99).

The court of appeals also noted that the Atkinses forfeited an otherwise effective defense of physiological impossibility by offering no evidence to support it (Pet. App. 21b). In fact, it was Mr. Atkins himself who elicited the testimony rebutting the defense. When he raised the issue with the state medical examiner on cross-examination, he was "completely startled" to hear him testify that a man in Mr. House's condition might well have been able to commit the crime (R 16/55-56). He was startled, of course, because neither he nor his wife had ever taken the time to talk to the examiner (R 16/7-8, 103). Yet even then he did not seek rebuttal evidence, although he had a specific doctor in mind who he believes would have supported his theory (R 16/56-57). Thus the Atkinses handed the prosecution yet another issue upon which the jury was compelled by the lack of evidence to draw that one expert witness termed "the adverse inference" (R 18/392).

These and yet other instances of prejudice were described in Mr. House's 100-page brief for the court of appeals. See pp. 40-55, 74-89.

state's witnesses, if he had only looked for witnesses of his own or bothered to learn what the state's proof would be?

This is not a case in which a state prisoner brings to the federal court a habeas petition raising technical issues that relate in no way to the question of guilt or innocence. As the magistrate explained to counsel after two years of this case:

> You know, everybody always tries to characterize their philosophy and I always claimed I was conservative. I don't know whether I am or not, but when I wrote the report and recommendation that you have before you, it occurred to me this is probably one of the few cases that I'll probably ever see as a Federal judicial officer where the Great Writ might very well have issued, even under the most restrictive views that was had of it in its beginning. That is, that this person may not be guilty (R 20/50).

This case is the essence of what habeas corpus was created to protect. See generally Stone v. Powell, 428 U.S. 465, 491 n.31 (1976); Rose v. Mitchell, 443 U.S. 545, 581 (1979) (Powell J., concurring). In United States v. Frady, 456 U.S. 152, 171 (1981), this Court, in denying the writ of habeas corpus, "emphasize[d]" "[a]t the outset . . . that this would be a different case had Frady brought before the District court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent." This is the "different case" noted in Frady. Having shown ineffective assistance, prejudice, and substantial evidence that he may be innocent, Mr. House is entitled to a new trial. After eleven years on death row, it is time for justice to be done.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

SETH P. WAXMAN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

(Counsel of Record)

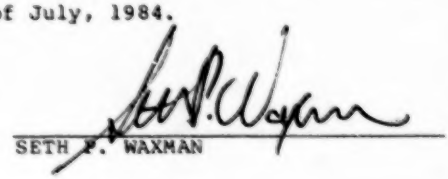
JOHN R. MYER
1515 Healy Building
Atlanta, Georgia 30303

JOHN CHARLES BOGER
16th Floor
99 Hudson Street
New York, New York 10013

ANTHONY G. AMSTERDAM
New York University Law School
40 Washington Square South
New York, New York 10012

CERTIFICATE OF SERVICE

I hereby certify that I caused three copies of the foregoing Brief for Respondent in Opposition, the Motion for Leave to Proceed in Forma Pauperis and the Affidavit and Certificate in support thereof to be sent by United States Mail, first-class postage prepaid, to Mary Beth Westmoreland, Esq., Assistant Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334 on this 23rd day of July, 1984.



SETH P. WAXMAN